INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 57

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ORDERS AND OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 113), filed November 10, 1955, is reported at 226 F. 2d 780. The order of the Court of Appeals, filed March 15, 1956, which amended that court's judgment of November 10, 1955, is set forth at R. 119-121.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1955 (R. 115). On January 31, 1956, by order of Chief Justice Warren, the time for filing

a petition for a writ of certiorari was extended to and including April 7, 1956 (R. 122). Thereafter, on March 15, 1956, the Court of Appeals entered an order amending its earlier judgment (R. 119-121). The petition for a writ of certiorari was filed April 6, 1956, and was granted on May 28, 1956 (R. 122). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board has power to declare a union out of compliance with Section 9 (h) of the National Labor Relations Act, upon finding in separate administrative proceedings, that an officer of the union has filed false non-Communist affidavits and that the union membership was aware of their falsity.

STATUTE INVOLVED

Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U.S.C. 159 (h), provides:

REPRESENTATIVES AND ELECTIONS

SEC. 9 * * *

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constitu-

ent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

This case arises out of the National Labor Relations Board's Determination and Order of February 1, 1955 (111 NLRB 422; R. 23-32), which declared the International Union of Mine, Mill and Smelter Workers ("the Union") out of compliance with Section 9 (h) of the National Labor Relations Act. This action was based on findings, arrived at in separate administrative proceedings and after hearing, that the non-Communist affidavits filed pursuant to that section by Union officer Maurice E. Travis were false, and that the Union membership was aware of their falsity.

1. *The events giving rise to the Board's compliance proceeding*

Commencing in August 1949, and annually thereafter, Travis, the Union's Secretary-Treasurer, as well as the other officers of the Union, filed with the Board the affidavits required by Section 9 (h).[1] The Board, presuming the affidavits to be truthful, regarded the Union as in compliance with Section 9 (h) and accorded it the Act's benefits (R. 3-4, 38).

[1] When the instant suit was commenced in February 1955, the most recent affidavit filed by Travis was dated October 19, 1954 (R. 4).

However, in 1953, during the course of a proceeding before the Board entitled *Precision Scientific Company* (Case No. 13-CA-1441)—involving the question of whether that company's refusal to bargain with the Union violated Section 8 (a) (5) of the Act—the Company ("Precision") challenged the veracity of Travis' Section 9 (h) affidavits. It alleged, *inter alia,* that, at the time he filed his initial affidavit in August 1949, Travis, in a statement published in the Union's newspaper and distributed to its members, asserted that he had resigned from the Communist Party solely in order to make it possible to execute a Section 9 (h) affidavit, but that he nevertheless continued to adhere to the principles of Communism and the Communist Party (R. 24, 76, 79).

On February 4, 1954, the Board, treating the sufficiency of a union's compliance with Section 9 (h) as a subject which, though not litigable by private parties in representation or unfair labor practice proceedings, is appropriate for separate administrative investigation and determination, issued an order directing an administrative investigation and hearing (33 LRRM 1322-1323, R. 33-34). The order recited the above facts alleged by Precision and set forth the Board's view that, if Travis' affidavits were in fact false to the knowledge of the Union membership, this would require cancellation of the Union's compliance status under the Act. It directed that a hearing be held before a hearing officer of the Board for the purpose of receiving evidence pertaining to the issues (1) whether Maurice E. Travis had admitted that the affidavits which he filed with the Board pursuant to Section 9 (h) of the Act were false, and (2) whether the

membership of the Union was aware that such affidavits were false. The order also provided that—after issuance of the hearing officer's report—exceptions thereto, briefs, and requests for oral argument could be filed with the Board itself.

2. *The Board's findings and conclusions*

Hearings were held before a hearing officer of the Board between May 10 and July 14, 1954 (R. 24, 34). The Union and Travis were represented by counsel and were afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, to introduce evidence relevant to the issues specified in the Board's order, to argue orally, and to file briefs *(ibid.)*.[2] Travis not only failed to appear or to take the stand in his own behalf, but he also refused to respond to a subpena *ad testificandum* issued at the request of the Board's General Counsel (R. 27, 36).

On September 10, 1954, the hearing officer issued his report finding, among other things, that Travis' August 1949 statement disclosed on its face that his contemporaneous non-Communist affidavit filed with the Board was false; that the evidence disclosed that his subsequent affidavits were also false; and that the membership of the Union was aware of the falsity of Travis' 1949 and subsequent affidavits, yet continued to reelect him (R. 32-79). The Union and Travis were given an opportunity to, and did, file exceptions to the report and a supporting brief. In addition, they filed a motion for an order directing the hearing officer to withdraw his report and to conduct a further hearing (R. 25).

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[2] Counsel for Precision was also permitted to appear and to participate as *amicus curiae* (R. 34).

On February 1, 1955, the Board issued its determination and order (R. 23-32, 111 NLRB 422), adopting in general the hearing officer's report. The Board's findings and conclusions may be summarized as follows:

The Travis statement, published in the Union newspaper of August 15, 1949, admits that the sole reason for his alleged resignation from the Communist Party was "in order to make it possible for me to sign the Taft-Hartley affidavit", and that such step was taken "with the utmost reluctance and with a great sense of indignation" (R. 76). The statement then goes on to assert, *inter alia,* that the "very premise of the Taft-Hartley affidavits is a big lie"; that it "is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union"; and that the "biggest lie of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence" (R. 77). In addition, Travis frankly acknowledged that, despite his alleged severance of Communist Party ties, he continued to believe in "Communism", and emphasized (R. 78-79):

> I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society * * * can lead to the end of insecurity, discrimination, depressions and the danger of war.
>
> I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror.

The Board found that this newspaper statement "disclosed on its face Travis' admission of the falsity of

his August 4, 1949, non-Communist affidavit" (R. 25). In arriving at this conclusion, the Board considered the meaning of the statement in the light of the undisputed evidence of Travis' long-established position as a member of the Communist Party; of his role as one of its leaders within the Union; and of his admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared the statement, and that "it meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (R. 26, 39-41, 60-61).

In the alternative, the Board concluded that, even when read literally, the statement constituted an admission of the falsity of Travis' 1949 affidavit (R. 26). As the Board noted (R. 27):

> It would stretch credulity beyond understanding were we required to assume that Travis had abandoned his Communist beliefs or his support of the Communist Party when he asseverates in the article "that good Communists are good trade unionists" working against the "rotten * * * foundation of the capitalistic system," and that "despite my resignation from the Communist Party, I shall continue to fight for these goals with all the energy and sincerity at my command." [See also R. 61-64.]

The Board further found that the undisputed evidence showed that, subsequent to August 1949, Travis had "not altered his allegiance to nor support of the Communist Party, nor his belief in the overthrow by force and violence of this Government", and that his

succeeding affidavits were likewise false (R. 27).[3] Thus, the uncontradicted testimony of Mason reveals that in August 1953 he requested Travis to give due recognition to the non-Communist faction in the Union and liberalize the official Union newspaper so that it would not always reflect the Soviet side (R. 41-42). Travis' reply was that "Mason and his brother had a chance 'to be way up with us in these councils if you would rejoin the Communist Party' " (R. 42). Moreover, as to the paper, "Travis rejected Mason's suggestion summarily, saying 'You know as well as I do that the Party and my people will not stand for those proposals' " (R. 42-43, 64-65).

Finally, the Board found that "the Union membership was aware of the falsity of *all* of Travis' affidavits" (R. 27). It based this conclusion on the "evidence of the publication, in the Union's official newspaper, of Travis' 1949 article in which he admitted the falsity of his initial affidavit, and the distribution of that newspaper to all the Union members; the fact of general awareness in this country of the true nature, aims and methods of Communism and the Communist Party; and the evidence * * * that the members of the Union were better equipped than the general public properly to evaluate Travis' 1949 newspaper article and his subsequent Communist activities" (R. 27-28). Summarizing the latter evidence, the Board pointed to "the CIO's investigation of Communist domination of the Union and its final expulsion of the Union from the CIO in 1950; the revolt of scores of locals from the

[3] This finding has subsequently been confirmed by Travis' recent conviction under 18 U.S.C. 1001, for filing false Section 9 (h) affidavits in 1951 and 1952. See Daily Labor Report, December 22, 1955, No. 248, p. A-3.

Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits;[4] and the resulting publicity to Union members" (R. 28, fn. 9; see also R. 43-46, 66-68).

On the basis of these findings, the Board concluded that the Union was not, and had not been, in compliance with the filing requirements of Section 9(h) of the Act, and ordered that the Union be accorded no further benefits under the Act until it had complied with these requirements (R. 31-32).[5]

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[4] *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers*, Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, Senate Committee on the Judiciary, 82d Cong., 2d Sess., October, 1952.

[5] The Union came back into compliance with Section 9(h) on February 23, 1955, when, shortly after the instant suit was commenced, Travis resigned as Secretary-Treasurer and was replaced by Albert Pezzati, who filed the required affidavit. However, this does not make the instant suit moot. Since the complaint in the *Precision Scientific* case (*supra*, p. 4) was issued in June 1953, an affidavit by Travis is essential to its validity, and thus the propriety of a bargaining order in that case depends on whether the present decompliance action is sustained or nullified. Hence, upon declaring the Union out of compliance, the Board, on February 16, 1955, dismissed the complaint against Precision (R. 80-81), which action was vacated March 25, 1955, pursuant to the stay of the decompliance determination (*infra*, p. 10) issued by the court below. In addition, there are other cases where benefits, already accorded to the Union on the basis of Travis' affidavits, would be subject to nullification were the Board's decompliance action sustained. E.g., *Etiwan Fertilizer Co.*, 113 NLRB 93; *Magnus Metal Division of National Lead Co.* (Case No. 21-RC-3724); *Phelps-Dodge Copper Products Corp.*, 111 NLRB 950.

3. *The Instant Suit*

On February 10, 1955, the Union, contending, *inter alia*, that the Board's determination and order were beyond its powers under the Act, filed the instant suit in the United States District Court for the District of Columbia, for injunctive relief against the Board's action (R. 2-7). On February 11, 1955, that court, after hearing, denied the Union's motions for a temporary restraining order and a preliminary injunction (R. 10-12). The Union appealed the denial of the preliminary injunction to the Court of Appeals.

On February 21, 1955, the District Court granted Precision, whose obligation to bargain with the Union was affected by the Board's decompliance determination, leave to intervene in the suit as a party defendant, and to raise defenses in addition to those asserted by the Board, namely, that, even if the Board's action were beyond its powers under the Act, injunctive relief should nevertheless be denied the Union because it was not a *bona fide* labor organization and had "unclean hands" (R. 81-82, 101-112).

On February 25, 1955, the Court of Appeals, pursuant to the Union's request, issued an order staying, during the pendency of the Union's appeal, the Board's decompliance determination as of the date of its issuance (35 LRRM 2577). On April 18, 1955, that court granted Precision leave to intervene as an appellee in the appeal.

On November 10, 1955, the Court of Appeals issued a *per curiam* opinion (R. 113), stating that:

> The District Court's order, entered February 11, 1955, is reversed on the authority of *Farmer* v. *International Fur & Leather Workers Union*,—

U.S. App. D.C., —, 221 F. 2d 862, decided February 15, 1955.

In the *Fur Workers* case, the Court of Appeals, following its earlier decision in *Farmer* v. *United Electrical Workers,* 211 F. 2d 36, certiorari denied, 347 U.S. 943, had held that, under the scheme of the Act, a false Section 9 (h) affidavit gave rise only to a criminal penalty for the guilty union officer, and did not in any way alter the union's right to continued Board benefits, even where its members were aware of the officer's fraud.[6]

The judgment accompanying the *per curiam* opinion (R. 114) remanded the case to the District Court "for further proceedings not inconsistent with the opinion of this Court." On January 13, 1956, the District Court, viewing this opinion as not touching the issues interjected into the case by Precision (*supra,* p. 10), declined to enter a preliminary injunction (R. 118-119). On March 15, 1956, the Court of Appeals, pursuant to the Union's motion, entered an order (R. 119-121) which: (1) made clear that its earlier decision had encompassed all of the legal issues in the case, including those raised by Precision, and (2) amended the judgment of November 10, 1955, so as to remand the case to the District Court "with directions to issue a preliminary injunction."[7]

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[6] In *United Electrical,* the court had only passed on the effect of a false affidavit, absent membership awareness thereof, stating (211 F. 2d at 39). "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit."

[7] Thereafter, on April 18, 1956, the District Court entered a preliminary injunction, enjoining the Board from giving effect to the decompliance determination at issue herein.

SUMMARY OF ARGUMENT

Section 9(h) of the National Labor Relations Act prohibits the Board from investigating a representation question involving a labor organization, or from issuing an unfair labor complaint based on that organization's charge, unless there is on file with the Board a non-Communist "affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit." The Section further provides that the "provisions of section 35A of the Criminal Code [18 U.S.C. 1001] shall be applicable in respect to such affidavits."

It is the position of the court below that Congress intended this criminal penalty to be the sole consequence of a false affidavit, and to make the veracity of the officer's affidavit irrelevant to the Board's functioning. In its view, Section 9(h) imposes on the Board the purely ministerial duty of seeing that the required affidavits are on file; if they are, the Board must accord the union the Act's benefits, and must continue to do so even should it be established in criminal proceedings that "what in form is an affidavit is merely a paper evidencing false swearing." *National Labor Relations Board* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873.

It is the Board's position, on the other hand, that the filing of a false affidavit constitutes an abuse of Board processes, and that, both apart from and under Section 9(h), the Board possesses implied power to protect its processes from abuse. Accordingly, the Board may satisfy itself as to the veracity of an of-

ficer's affidavits, and, should their falsity be established, either through the Board's separate administrative investigation or criminal proceedings instituted against the officer by the Department of Justice under 18 U.S.C. 1001, the Board is empowered to cancel the union's compliance status under the Act and to revoke any certifications or other benefits dependent upon valid affidavits from that officer.

I

We first detail the Board's efforts to protect against fraudulent compliance with Section 9 (h), showing, in particular, that by the end of 1952 there had occurred certain events—including a conviction of a union officer for filing a false affidavit, and a grand jury presentment in New York questioning the truthfulness of other affidavits—which caused the Board to conclude that it was required to concern itself with the veracity of the affidavits. However, the court below has consistently held that the Board has no such power, and has enjoined efforts by the Board administratively to remedy the filing of false affidavits.

II

In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19, this Court recognized that the Board is endowed with implied power to protect its processes from abuse, and to make appropriate inquiries toward that end. The exercise of such power has been deemed appropriate in the situation, *inter alia*, where an unfair labor practice charge was allegedly filed "for the purpose of effectuating the objects and designs of the Communist Party rather than to enforce the rights of an employee under

the Act" (*National Labor Relations Board* v. *Fulton Bag & Cotton Mills,* 180 F. 2d 68, 71 (C.A. 10)), where a complying union "fronts" for a non-complying union, or where a union office is concealed in order to avoid having the incumbent file an affidavit. Acquiring access to Board processes by means of a false Section 9(h) affidavit constitutes an abuse of these processes no less than in those situations. Hence, as in those cases, the Board's general and necessary power to safeguard the integrity of its processes should furnish ample basis for a Board inquiry into the genuineness of Section 9(h) affidavits clouded by doubt, and for revoking the union's compliance status if the falsity of the affidavits be established.

III

This conclusion is consistent with the scheme, history and purpose of Section 9(h).

A. The terms of the Section impose a continuing duty on the Board to withhold its processes from noncomplying labor organizations, and require the Board to declare a union out of compliance for such a "matter of happenstance" (*National Labor Relations Board* v. *Dant,* 344 U. S. 375, 383-384) as the failure of an officer to make timely renewal of his affidavit, or a change in the complement of the union's officers. Such a statutory scheme seems clearly to contemplate that the Board would investigate the sufficiency of compliance where the affidavit itself appears to be false, and declare the union out of compliance should such falsity be established. For, not only is this a more serious flouting of the purposes of Section 9(h), it is fundamental that "fraud destroys the validity of everything into which it enters." *Nudd* v. *Burrows,* 91 U. S. 426, 440. Hence,

establishing that an officer's affidavit is false in effect voids it, and, insofar as Board proceedings are concerned, it is just as though no affidavit had ever been filed.

Board power to decomply a union where its officer has filed false affidavits would, moreover, effectuate the broad objective of Section 9(h). As this Court has recognized, that Section was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U. S. 382, 393. If the sole consequence of a false Section 9(h) affidavit is a criminal penalty for the officer filing the affidavit, this leverage is substantially reduced.

Should the officer, though still a Communist, be willing to file an affidavit, the union incurs no risk by keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even where the officer's deceit has been established in criminal proceedings. To be sure, the officer may go to jail, but the union is able to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing.

On the other hand, Board power to decomply should the officer's affidavit prove false would prompt the union to keep a continuing check on its officers, and to remove a Communist officer as soon as his deceit comes to light.

B. The legislative history of Section 9(h) does not support a contrary conclusion. It discloses that the version of the provision which was originally passed by both houses of Congress forbade the granting of benefits under the Act to any labor union if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief. Under that version, the Board, *prior* to conferring benefits under the Act, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics. This was changed in conference—to the present requirement that officers file disclaiming affidavits which, like other statements made to the Government, would be subject to Section 35A of the Criminal Code [18 U.S.C. 1001]—solely for the reason that Board proceedings "might be indefinitely delayed if the Board *was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation" (2 Leg. Hist. of the Labor-Management Relations Act, 1947, p. 1542, emphasis added).

Congress, in order to avoid delays in Board representation and unfair labor practice proceedings, thus made it clear that such proceedings could continue once the required affidavits were on file, and that the alleged Communist character of the union involved was not open to litigation therein. However, it does not follow that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in criminal or separate administrative proceedings, from altering the union's compliance status. In these latter circumstances, the Board's action does not

interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership, the ultimate end of Section 9(h); the affidavit device, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers.

The Board's view is confirmed by a Senate report issued subsequent to the enactment of Section 9(h) (S. Doc. No. 26, 83d Cong., 1st Sess., pp. 28-29) which asserts that the false affidavit constitues an "obvious abuse" of Board processes, and that Section 9(h) does not affect the power which the Act otherwise confers upon the Board to protect its own processes from abuse.

IV

No question is now presented as to sufficiency of the evidentiary basis for the Board's findings herein. In any event, the evidence summarized in the Statement (pp. 4-9, *supra*) demonstrates that the Union was accorded a full and fair hearing, and that there is ample support for the Board's findings that all of Union officer Travis' affidavits were false, and also that the Union membership was aware of their falsity.

ARGUMENT

The instant case presents the same basic issue as that involved in the companion case, *Amalgamated Meat Cutters* v. *National Labor Relations Board,* No. 40. The Board's position on the common issue will be developed primarily in this brief, and this analysis is equally applicable to No. 40; the Board's brief in No. 40 will deal only with the specialized aspects of that case.

Section 9(h) of the National Labor Relations Act prohibits the Board from investigating a representation question involving a labor organization, or from issuing an unfair labor practice complaint based on that organization's charge, unless there is on file with the Board a non-Communist "affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit." The Section further provides that the "provisions of section 35A of the Criminal Code [18 U.S.C. 1001] shall be applicable in respect to such affidavits."

It is the position of the court below, and of the union here and in No. 40, that Congress intended the criminal penalty thus specified to be the sole consequence of a false affidavit, and to make the veracity of the affidavit irrelevant to the Board's functioning. That is, according to this view, Section 9(h) imposes on the Board the purely ministerial duty of seeing that the required affidavits are on file; if they are, the Board must accord the union the Act's benefits. Should the Board have reason to believe that its processes have been abused through the filing of false affidavits, it is powerless to conduct an administrative inquiry to determine whether

this be so. Moreover, it must continue to regard the union as in compliance with the Act even after the fraud has been established, either in an administrative proceeding (which occurred in this case) or by virtue of the officer's criminal conviction for filing a false affidavit (which occurred in No. 40).

The Board, on the other hand, believes that: (1) wholly apart from Section 9(h), it possesses implied power to protect its processes from abuse; and (2) Board power to decomply a union where an officer's affidavits prove to be false, far from being negated, is confirmed by the scheme and legislative history of Section 9(h), and effectuates its purposes. Before turning to these points, however, we shall first outline the history of the Board's efforts to protect against fraudulent compliance with Section 9(h).

I

The Board's Efforts to Protect Against Fraudulent Compliance with Section 9(h) of the National Labor Relations Act

When Section 9(h) became effective at the end of 1947, it was necessary for the Board to have a procedure which would assure that the proper union officials had filed the required affidavits, without unduly delaying the hundreds of pending cases and the additional hundreds which were anticipated in the near future. An Affidavit Compliance Branch was established within the Board to keep records of the affidavits filed, as well as of the financial and other data required by the companion Sections 9(f) and (g). (Appendix, *infra*, pp. 44-46).[8] Moreover, provisions were added to the

[8] *See National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844, n. 1 (C.A. 4); Memorandum of August 19, 1947, regarding compliance with Sections 9 (f), (g) and

Board's Rules and Regulations which specified, in relation to Section 9(h), what information had to be filed, by whom, and when.[9] At the same time, the Board made it clear that the sufficiency of compliance with Section 9(h) was a matter for the Board's administrative determination and was not subject to litigation by the parties in an unfair labor practice or representation proceeding.[10]

This initial procedure rested on the assumption that compliance with Section 9(h) could be assessed simply by ascertaining whether a non-Communist affidavit had been received from every officer of the labor organization filing the unfair labor practice charge or the representation petition, and every officer of its affiliates. It was not long, however, before the Board found that additional steps were required to avoid circumvention of Section 9(h). Thus, to meet the situation where the non-complying union used a union whose officers had filed affidavits, or an individual who is not subject to the requirements of Section 9(h), as a "front," the Board concluded that benefits should not be accorded to the "fronting" party notwithstanding his nominal compliance or exemption from Section 9(h).[11] Simi-

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(h), from the General Counsel of the Board, reproduced in Appendix B to the Board's brief in *National Labor Relations Board* v. *Dant*, No. 97, October Term, 1952.

[9] Rules and Regulations of the National Labor Relations Board, Series 5 as amended, Sec. 203.13(b), and Statements of Procedure, Sec. 202.3; 29 C.F.R. §§ 102.13(b), 101.3(b). These provisions are set forth in the Appendix, *infra*, pp. 46-50.

[10] *Lion Oil Co.*, 76 NLRB 565, 566, cited with approval by the Joint Committee on Labor Management Relations, S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45. See also, *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C.A. 6), certiorari denied *sub nom. Ann Arbor Press* v. *National Labor Relations Board*, 342 U.S. 859.

[11] See *Campbell Soup Co.*, 76 NLRB 950; *U.S. Gypsum Co.*, 77 NLRB 1098.

larly, to meet the situation where an office previously listed in the union constitution had allegedly been eliminated in order to avoid having the incumbent file a non-Communist affidavit, the Board concluded that, even though an affidavit had been received from every nominal union officer, it would administratively investigate that contention and, if it were established, declare the union out of compliance with Section 9(h) until the concealed officer had also filed an affidavit. [12]

The situation here, where the affidavits on which the union's compliance status is based turn out to be fraudulent, poses a related problem. In line with its view that compliance questions were not litigable by private parties in unfair labor practice or representation proceedings (fn. 10, *supra*), the Board, from the beginning, refused to permit litigation therein of the veracity of the affidavits. [13] Moreover, believing that a false affidavit necessitated only an invocation of the criminal sanction specified in Section 9(h), the Board did not, at the outset, even go into the question of falsity administratively; it merely referred affidavits which appeared questionable to the Department of Justice for possible criminal prosecution. [14] However,

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[12] See Rules and Regulations of the National Labor Relations Board, Series 6, Sec. 102.13(b)(3), 29 C.F.R. § 102.13(b)(3) (1956 Supp.), set forth in the Appendix, pp. 49-50, *infra*; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 266-267, fn.; *Compliance Status of Local 1150, United Electrical, Radio and Machine Workers of America*, 96 NLRB 1029; *Compliance Status of Furniture Workers, Upholsterers and Woodworkers Union, Local 576, Independent*, 107 NLRB 872.

[13] See *Craddock-Terry Shoe Corp.*, 76 NLRB 842; *American Seating Co.*, 85 NLRB 269, 271-273; *Coca-Cola Bottling Co. of Louisville, Inc.*, 108 NLRB 490, 491.

[14] See *NLRB Summary of Section 9(h) Problems*, set forth in *Communist Domination of Certain Unions, Part III*, Report of the Senate Subcommittee on Labor and Labor Management Re-

by the end of 1952, certain events had occurred which led the Board to conclude that, in order to protect its processes from abuse and avoid impairment of the purposes of Section 9(h), it, too, was empowered and required to concern itself with the veracity of the affidavits.

At that time, the Department of Justice obtained its first criminal conviction against a union officer (Valenti, an official of Local 80-A of the United Packinghouse Workers) for filing a false Section 9(h) affidavit, thus confronting the Board with the problem of whether an affidavit whose falsity was not merely alleged but had been clearly established could any longer serve as a basis for Board benefits. At about the same time, a grand jury, which had been convened in New York for purposes of investigating the veracity of the Section 9(h) affidavits filed by certain officers of other unions, called to the Board's attention an apparent palpable abuse of Board processes; the grand jury issued a presentment, which was transmitted to the Board by District Judge Weinfeld, asserting that these officers, including Ben Gold of the Fur and Leather Workers Union, had declined before the grand jury to acknowledge that the affidavits they had previously filed with the Board were truthful.[15] Moreover, the veracity of the affidavits filed by Travis and other officials of respondent union were questioned in hearings conducted by a Subcommittee of the Senate Judiciary

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lations, 82d Cong., 2d Sess., pp. 6-7; Hearings before the Senate Subcommittee on Labor and Public Welfare on *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess., p. 91.

[15] Although the presentment was subsequently expunged by the court, this occurred about six months after its transmittal. *Application of United Electrical Workers, et al.*, 111 F. Supp. 858 (S.D.N.Y.).

Committee (fn. 4, *supra*). And a Subcommittee of the Senate Committee on Labor and Public Welfare made plain that, in its view, Congress never intended that the provision in Section 9(h) for criminal sanctions would make the veracity of the affidavit irrelevant to the Board's functioning (see pp. 38-39, *infra*).[16]

Respecting the Valenti conviction, the Board issued an administrative order, directing the union to show cause why it should not be declared out of compliance with Section 9(h) and be deprived of any certifications which issued to it on the basis of Valenti's affidavits; and, after studying the union's response, the Board concluded that the conviction had the effect of nullifying the union's compliance status under the Act and its outstanding certifications.[17] Similarly, on December 19, 1952, following receipt of the grand jury presentment, the Board issued an administrative order reciting the facts set forth in the presentment and directing each of the union officers involved to reaffirm his Section 9(h) affidavits; the officer was advised that a failure to respond would result in a declaration that his union was not in compliance with the filing requirements of the Act. This inquiry was blocked, February

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[16] Hearings before the Senate Subcommittee on Labor and Public Welfare on *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess., pp. 104-105, 114-115; *Public Policy and Communist Domination of Certain Unions*, Report of the Senate Subcommittee on Labor and Labor Management Relations, S. Doc. No. 26, 83d Cong., 1st Sess., pp. 28-29.

[17] *In re Compliance Status of Local 80A, United Packinghouse Workers of America, CIO*, 101 NLRB 1253, discussed in Seventeenth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1953), p. 26; *Kind and Knox Gelatine Co.*, 101 NLRB 1255; *Consolidated Cigar Corp.*, 101 NLRB 1254; *A. Siegel & Sons*, 101 NLRB 1254, 1257; *Knox Gelatine Co.*, 101 NLRB 1256.

6, 1953, by an injunction issued by the District Court for the District of Columbia. *United Electrical Workers, et al.* v. *Herzog,* 110 F. Supp. 220, affirmed *sub nom. Farmer* v. *United Electrical Workers,* 211 F. 2d 36 (C.A. D.C.), certiorari denied, 347 U. S. 943.

Thereafter, indictments under 18 U.S.C. 1001, were returned against Ben Gold and several other union officers for filing false Section 9(h) affidavits. Of the view that these indictments, if they culminated in convictions, would affect the union's compliance status under the Act and the vitality of its Board certifications, the Board, on October 23, 1953, issued a general statement of policy respecting the indictments. It declared that, in processing representation cases involving unions whose officers have been indicted for filing false Section 9(h) affidavits, it would defer the issuance of any new certifications to those unions, pending the outcome of the criminal proceeding (18 F.R. 7185). On November 23, 1953, the effectuation of this policy was also enjoined. *Fur Workers* v. *Farmer,* 117 F. Supp. 35 (D.D.C.), affirmed 211 F. 2d 36 (C.A. D.C.), certiorari denied, 347 U.S. 943.

Finally, in April 1954, the criminal proceeding against Gold having resulted in his conviction, the Board ordered the Fur Workers to show cause why, unless Gold were removed from office, the union should not be deprived of further benefits under the Act. When the union responded, *inter alia,* by reelecting Gold to a new term as president, the Board entered an order declaring the union to be out of compliance with Section 9(h).[18] In the same period, the administrative

[18] *Compliance Status of International Fur & Leather Workers Union,* 108 NLRB 1190. The effect of Gold's conviction is directly presented in No. 40.

investigation involved here, concerning the validity of Travis' Section 9(h) affidavits, was undertaken, culminating in the decompliance determination of February 1, 1955 (pp. 4-9, *supra*). Both of these efforts were likewise checked by the courts.[19]

II

Wholly Apart from Section 9(h), the Board Possesses Implied Power to Protect Its Processes from Abuse

This Court recognized early in the history of the Act that the Board is endowed with implied power to protect its processes from abuse, and accordingly to make appropriate inquiries toward that end. Thus, in *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, the Court sustained a remand to the Board for the purpose of taking evidence on violence allegedly engaged in by the charging party to influence the course of the unfair labor practice proceeding. In so doing, it held that the Board (*Id.*, 18-19):

> may decline to be imposed upon or to submit its process to abuse. The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union as to constitute an abuse of the Board's process.

This was reaffirmed in *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 235, the Court stating that "the character of a complainant may rightfully influence the Board in entertaining a complaint."

[19] *Fur Workers* v. *Farmer*, 34 LRRM 2493 (D.D.C.), affirmed, 221 F. 2d 862 (C.A. D.C.); pp. 10-11, *supra*.

Similarly, the Court of Appeals for the Tenth Circuit recognized the existence of such power where it was contended that the Board proceeding should be dismissed because the underlying unfair labor practice charge had been filed "for the purpose of effectuating the objects and designs of the Communist Party rather than to enforce the rights of an employee under the Act." *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 71. The court, holding that this "was a matter resting in the sound discretion of the Board," pointed out that (*Ibid.*):

> * * * [the Board] may properly determine for itself whether its processes are being abused through the filing of an information based upon evil and unlawful purposes of the informer rather than a purpose to present a violation of the Act, and in exploring that question the Board may give appropriate consideration to all facts and circumstances which have material bearing. It may do that for the purpose of protecting its processes against abuse. And if it determines with reasonable foundation that its processes would be abused by filing a complaint and going forward with the proceeding, it may decline to entertain and proceed upon the charge. In like manner, if it determines later that its processes are being abused it may decline to proceed further. . . .

See also, *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 954-955 (C.A. 6), certiorari denied, 336 U.S. 972. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643.

On various occasions, the Board itself has dismissed proceedings where it found that its processes had been

misused. For example, the Board has dismissed a complaint where it was shown that the charge had been filed, not for the purpose of obtaining relief from the unfair practice, but solely to further a collusive scheme between a rival union and the company, designed to oust the incumbent union. *Hollywood Ranch Market*, 93 NLRB 1147, 1153-1154. In respect to representation cases under Section 9(c) of the Act, the Board has dismissed election petitions where investigation of the membership cards submitted by the union to evidence its support among the employees revealed the lack of an authentic substantial interest (see Twentieth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1956), pp. 12-13), and has revoked certifications after their issuance when it subsequently found that they were being used for discriminatory purposes (*Larus & Brother Co.*, 62 NLRB 1075; *Hughes Tool Co.*, 104 NLRB 318). See also, pp. 20-21, *supra*.

Acquiring access to Board processes by means of a false Section 9(h) affidavit constitutes an abuse of these processes no less than filing an unfair labor practice charge for improper motives, asserting a fictitious representation claim, or using a Board certification to further racial discrimination. Accordingly, no less than in these situations should the Board's general and necessary power to safeguard the integrity of its own functioning furnish ample basis for a Board inquiry into the genuineness of Section 9(h) affidavits clouded by doubt, and for revoking the union's compliance status if the falsity of the affidavits be established.[20]

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[20] The statement of the court below in *United Electrical Workers*, 211 F. 2d 36, 39, that there is no basis for "excluding the union from the Act's benefits because its officer had deceived the union

Moreover, as we shall now show, this conclusion is consistent with the scheme and history of Section 9(h).

III

Board Power to Decomply a Union When Its Officer's Affidavits Prove to be False is Consistent with the Scheme and History of Section 9(h), and Effectuates Its Purpose

A. *The terms of Section 9(h) and its purpose*

1. The terms of Section 9(h) (pp. 2-3, *supra*) impose a continuing duty on the Board to withhold its processes from noncomplying labor organizations. The Section requires each officer to renew his affidavit on file with the Board every twelve months, and because "of the fluid and elective nature of the official personnel of labor unions" (*National Labor Relations Board* v. *Dant*, 344 U.S. 375, 383) new affidavits may even have to be filed at shorter intervals. In representation cases, for example, the Section also requires that the appropriate affidavits be on file at each stage of the investigation, and the Board must therefore keep constantly alert to expiration dates of affidavits already filed and to changes in union officials, and is required, when it finds that the affidavits no longer meet the requirements of Section 9(h), to halt pending cases.[21] Furthermore,

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as well as the Board by filing a false affidavit," suggests that, if there be an abuse of Board process, the union cannot be charged with it but only the officer who filed the false affidavit. We submit that this overlooks the fact that, in filing the affidavit, the officer was acting as an agent of the union (see also, pp. 37-38, *infra*); in any event, where, as here, the union members were aware of the hoax perpetrated by the officer and nevertheless continued him in office (pp. 8-9, *supra*), there can be no question that the union has become a participant in the fraud and has itself abused the processes of the Board.

[21] See *Rite-Form Corset Co.*, 75 NLRB 174, 175; Fifteenth Annual Report of the National Labor Relations Board (Gov't Print. Off., 1950), pp. 26-27; *Tube Turns, Inc.*, 101 NLRB 528; n. 8, *supra*.

even after it has issued a certification or a bargaining order, the Board nullifies such benefit should its subsequent administrative investigation reveal that the union involved had not been in full compliance with Section 9(h) because certain of its officials who were in fact officers within the meaning of the Section, or one of its constituent parts which was in fact a separate labor organization, had failed to file affidavits.[22]

A statutory scheme which permits the Board to investigate the sufficiency of compliance in these respects, and, indeed, to declare a union out of compliance merely because an officer's affidavit has expired or the complement of officers has changed,[23] seems clearly to contemplate that the Board could investigate the sufficiency of compliance where the affidavit itself appears to be false, and declare the union out of compliance should falsity be established. See *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650-651 (C.A. 6). For not only is this a more serious flouting of the purposes of Section 9(h), but also it is fundamental that "fraud destroys the validity of everything into which it enters" (*Nudd* v. *Burrows*, 91 U.S. 426, 440). Hence, establishing that an officer's affidavit is false in effect voids it, and, insofar as Board proceedings are concerned, it is just as though no affidavit had

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[22] See n. 12, p. 21, *supra*; *Sunbeam Corp.*, 98 NLRB 525; *California Wrought Iron, Inc.*, 107 NLRB 1095; *Safrit Lumber Co., Inc.*, 108 NLRB 550. Cf. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322.

Similar action is taken when the Board discovers a defect in compliance with the companion Sections 9(f) and 9(g). *Compliance Status of Plaster Tenders*, 111 N.L.R.B. 742; 38 L.R.R. 219.

[23] A "matter of happenstance" which often affects "unions which do have leadership willing to comply." *National Labor Relations Board* v. *Dant*, 344 U.S. 375, 383-384.

ever been filed by him; "what in form is an affidavit is merely a paper evidencing false swearing" (*National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873). Nor would the defect in compliance be averted by the circumstance that the period of a Section 9(h) affidavit is one year, and thus, by the time the fraud on one affidavit is uncovered, the officer may already have filed a new affidavit; any benefits obtained during the life of the old affidavit depend upon the validity of that affidavit and could not be "saved" by a subsequent affidavit, however valid it may be. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325.

The mere fact that Section 9(h) specifically provides that "section 35A of the Criminal Code shall be applicable in respect to such affidavits" does not indicate a contrary statutory scheme, *viz.*, that the criminal penalty was meant to be the sole sanction for a false affidavit. The affidavits would have been subject to this provision (18 U.S.C. 1001), which is applicable to false statements made to any government agency (see *United States* v. *Gilliland*, 312 U.S. 86; *United States* v. *Bramblett*, 348 U.S. 503, 504), irrespective of whether it was specifically incorporated in Section 9(h). (See *Marzani* v. *United States*, 168 F. 2d 133, 141 (C.A.D.C.), affirmed, 335 U.S. 895, 336 U.S. 922; *National Labor Relations Board* v. *Eastern Massachusetts Street Railway* (C.A. 1, July 31, 1956), 38 LRRM 2520, 2524). Existence of a criminal penalty does not normally mean that civil or administrative sanctions are excluded. See, for example, *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, in which this Court held that the criminal and civil penalties specified in the Second War Powers Act did

not deprive the Office of Price Administration, to whom had been delegated the authority to allocate scarce materials conferred by that Act, of the power to protect the integrity of its rationing regulations by issuing suspension orders against, and withholding rationed materials from, violators thereof. And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, the Court upheld the power of a district court, asked to enforce a maximum rent control order, to decree restitution of the overceiling amounts, in addition to the criminal and other civil remedies which had been specified by Congress. Cf. also, *Rex Trailer Co.* v. *United States*, 350 U.S. 148; *United States* v. *LeRoy Dyal Corp.*, 186 F. 2d 460 (C.A. 3); certiorari denied, 341 U.S. 926. In short, unless Congress has indicated that the sanction it specifies is to be exclusive, there is no bar to use of other appropriate remedies consonant with the scheme and objective of the particular statute.

2. Board power to decomply a union where its officer has filed false affidavits would, moreover, effectuate the broad objective of Section 9(h). As this Court has recognized, that Section was designed to minimize the threat of "political strikes" by "exerting pressures on unions to deny office to Communists" and other exponents of violent overthrow of the Government. *American Communications Association* v. *Douds*, 339 U.S. 382, 393. See also, *Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62, 69-70. If the sole consequence of a false Section 9(h) affidavit is a criminal penalty for the officer filing the affidavit, this leverage is reduced to a feeble reed.

Should the officer, though still a Communist, be willing to file an affidavit,[24] the *union* incurs no risk by

[24] It is now clear that the Communist Party has long followed the policy of having its members "formally" resign without really

keeping him in office even when, as here, its members are aware of his fraud from the outset. Similarly, should the union discover after the officer has filed an affidavit that he is still a Communist, the Act would provide no incentive for removing him from office, even in cases like No. 40, where the officer's deceit has been established in criminal proceedings. To be sure, in both these cases the officer may have to go to jail, but the union is able, with impunity, to keep all the benefits under the Act which it improperly acquired as a result of his wrongdoing. The Board would even be required, where the officer admits the falsity of his affidavit at the very time he filed it with the Board (which, in effect, is the situation in this case), to honor that affidavit and accord benefits to the union based thereon. To grant benefits to a union, one of whose officers is an undenied Communist, certainly frustrates "the congressional purpose * * * to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstituional overthrow of our Government.'" *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U.S. 322, 325.

On the other hand, Board power to decomply should the officer's affidavit prove false would prompt the union to keep a continuing check on its officers, and to remove a Communist officer as soon as his deceit comes to light. The union could not afford to sit back once its officers had filed affidavits, and blind itself to their

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severing Party ties, and that this policy was specifically adopted in respect to Section 9(h) affidavits. See R. 41; *Hupman* v. *United States*, 219 F. 2d 243, 247-248 (C.A. 6), certiorari denied, 349 U.S. 953; brief for the United States in opposition, *Gold* v. *United States*, No. 137, this Term, pp. 9-15.

falsity; for, if these facts came to the Board's attention, the union would lose its compliance status under the Act and the Board benefits obtained through those affidavits.

B. *The legislative history of Section 9(h)*

The main basis for the conclusion of the court below that Congress intended to make the veracity of the Section 9(h) affidavit irrelevant to the Board's functioning is the legislative history of that Section. We do not agree that that history, on balance, supports the ruling below.

As originally reported by the House Labor Committee, H. R. 3020 contained the following provision (1 Leg. Hist. of the Labor-Management Relations Act 1947 (Gov't Print. Off., 1948), p. 63):

Sec. 9(f)

* * *

(6) No labor organization shall be certified as the representative of the employees if one or more of its national or international officers, or one or more of the officers of the organization designated on the ballot taken under subsection (d) [providing for representation elections], *is* a member of the Communist Party or by reason of active and consistent promotion or support of the policies, teachings, and doctrines of the Communist Pary can reasonably be regarded as being a member of or affiliated with such party, or believes in, or *is* a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. [Emphasis added.]

On the floor of the House, the phrase "or ever has been" was added after the italicized "is," to cover past as well as present membership (1 Leg. Hist. 190, 784, 798), and the bill passed the House in this form.

The Senate bill, S. 1126, did not contain a similar provision when reported out of committee. However, on the floor, Senator McClellan proposed to add, as Section 9(h) of the Senate bill, a provision identical to the one which had just been passed by the House (2 Leg. Hist. 1434). This amendment was agreed to, after deleting the "ever has been" phrase so as to limit the section (as was the original House version) to present membership (2 Leg. Hist. 1435-1436).

Under both the House and Senate provisions, the Board, *prior* to issuing a certification to a labor organization, would have had to conduct an inquiry into whether the officers were in fact free of the disqualifying characteristics (see 2 Leg. Hist. 1435). In the Conference Committee, the Senate provision was adopted except that, in place of an initial Board inquiry, there was substituted the present requirement that the officers file disclaiming affidavits.[25] According to a statement submitted by Senator Taft, this change was made because of "the fact that representation proceedings might be indefinitely delayed *if the Board was required* to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation" (2 Leg. Hist. 1542, emphasis added). Senator Taft added, on the floor, that (2 Leg. Hist. 1547):

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[25] The Section, which had previously been confined to representation cases, was also made applicable to unfair labor practice cases. See *National Labor Relations Board* v. *Dant*, 344 U.S. 375.

> We changed the provision regarding Communist officers. The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists . . . the way it was passed by the Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist. Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. [p. 30, *supra*] [26]

Hence, Congress, in order to avoid delays in Board representation and unfair labor practice proceedings, made it clear that such proceedings could continue once the required affidavits were on file, and that the alleged Communist character of the union involved was not open to litigation therein.[27] However, it does not follow that there was any Congressional purpose to have this initial acceptance of affidavits preclude the Board itself, when fraud has been subsequently established in criminal or separate administrative proceedings, from altering the union's compliance status.[28]

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[26] See also, 2 Leg. Hist. 1625 (Senator Taft), 1627 (Senator Ball).

[27] See *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C.A.D.C.), certiorari denied, 347 U.S. 968; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649-651 (C.A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C.A. 5), certiorari denied, 348 U.S. 873; *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C.A. 7). Cf. *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264.

[28] That the Board may have had a more limited view of its function at the outset (pp. 20-22, *supra*), does not, of course, preclude the Board from now acting in respect to false Section 9(h)

In these latter circumstances, the Board's action does not interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique. Accordingly, to read the legislative history as precluding Board power to decomply the union, where the falsity of the officer's affidavit is subsequently established in separate proceedings, serves only to make the filing of affidavits, a requirement inserted solely as a means for facilitating the goal of withholding the Act's benefits from unions with Communist leadership, the ultimate end of Section 9(h); the affidavit device, which was adopted only for the purpose of easing the Board's burden in unfair labor practice and representation cases, becomes a means of lessening the union's responsibility to clean out Communist officers. On the other hand to read this history as removing the issue of the truthfulness of the affidavit merely from litigation in unfair labor practice and representation proceedings, but not otherwise making it irrelevant for continued Board benefits, gives effect to Congress' adoption of the affidavit technique, without at the same time obscuring the basic objective of Section 9(h), which is not to punish falsehood but to withhold the benefits of the Act from unions unless they rid themselves of Communist officers (pp. 31-33, *supra*).

Nor is the Board's reading of the legislative history impaired by the lower court's assumption that Congress could not have intended to vest the Board with power to decomply the union, because, if the "officer

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affidavits, provided, as we have shown, it in fact possessed such power. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648.

had deceived the union as well as the Board," decompliance would result in penalizing "the great mass of innocent union members" (*Farmer* v. *United Electrical Workers*, 211 F. 2d at 39). In view of the Board's findings (pp. 8-9; *supra*) that the Union members were aware of Travis' fraud from the outset, the instant case does not present the "innocent" members problem. In any event, we submit that the court's assumption is erroneous. Throughout the Congressional debates on Section 9(h) the opponents repeatedly pointed out that the very nature of the limitation was such that the "real sufferers" would be "all the union members—whether they are anti-Communist, non-Communist, or Communist."[29] Nevertheless, the majority of Congress—concluding that the danger of "political strikes" from Communist union officers was as great where the rank-and-file were unsuspecting dupes as where they were conscious followers—deliberately rejected this consideration, conditioning the union's right to access to the Board on the objective determination whether it had rid itself of Communist leaders, and without reference to the extent to which individual union members were thereby denied benefits or the degree to which individual members were guilty or innocent of responsibility for the continuance in office of the Communist leadership.

Furthermore, there is little reason why, under the scheme of the Act, the position of union members who are deceived by their officers should be any better than that of members who are misled by Board action. Thus,

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[29] 2 Leg. Hist. 1568 (Senator Murray). See also, 1 Leg. Hist. 380 (House Minority Report), 887 (Representative Madden); 2 Leg. Hist. 1559 (Senator Morse), 1584 (Senator Murray).

in the situation involved in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the Board, for a period, had regarded the union as in full compliance with Section 9(h) even though the officers of its parent federation had not filed affidavits, and had accorded the union benefits under the Act; when this Court subsequently disagreed with the Board and declared that the union had never been in full compliance, the union—through no fault of its members, nor, indeed of its officers—lost all the benefits previously obtained.[30] So here, the mere fact that like consequences would result if the Board were empowered to declare a union out of compliance upon the determination of an officer's fraud, either in criminal or separate administrative proceedings, should not negate the existence of the power.

Finally, the view that Congress did not intend to preclude the Board from withdrawing the benefits of the Act when the falsity of an officer's Section 9(h) affidavit has been established in this manner is confirmed by a Senate report issued subsequent to the enactment of Section 9(h).[31] This report discussed the

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[30] See also, *National Labor Relations Board* v. *J. I. Case Co.*, 189 F. 2d 599 (C.A. 8); *National Labor Relations Board* v. *Clark Shoe Co.*, 189 F. 2d 731, 733 (C.A. 1). Alleviation of this result required a specific amendment to the Act. Act of October 22, 1951, 65 Stat. 601.

[31] *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess., Report of the Subcommittee on Labor and Labor-Management Relations, March 2, 1953. The propriety of utilizing such post-legislative material has been recognized. See *Herzog* v. *Parsons*, 181 F. 2d 781, 785 (C.A.D.C.), certiorari denied, 340 U.S. 810; *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922-923 (C.A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U.S. 859.

steps which the Board had taken (see pp. 20-24, *supra*) to prevent circumvention of Section 9(h), including, as in the case of the *United Packinghouse Workers (Local 80A)* (101 NLRB 1253), the revocation of the union's compliance status and certifications on conviction of its officer for filing a false affidavit (Report, *op. cit.*, n. 31, pp. 8-9). It then concluded that such action is within the Board's "authority under existing law," and not inconsistent with Congress' intention to avoid Board conduct of "an independent investigation on the merits as to whether a particular 9(h) affiant is or is not a Communist" (*id.*, at 28-29).

In sum, the false affidavit constitutes an "obvious abuse" of Board processes, and Section 9(h) does not affect the power which the Act otherwise confers upon the Board (see pp. 25-28, *supra*) " 'to protect its own processes from abuse' " (*ibid.*).[82]

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[82] These conclusions are not inconsistent with the recent enactment of the Communist Control Act of 1954, 68 Stat. 775, Section 10 of which, *inter alia*, empowers the Subversive Activities Control Board to determine whether a labor organization is Communist-infiltrated, and provides that, when such finding has become "final", the union shall be deprived of benefits under the National Labor Relations Act. 68 Stat. at 778, 50 U.S.C. (1952 ed. Supp. II) 792a. This new law does not purport to repeal Section 9(h) of the National Labor Relations Act, or otherwise lessen whatever powers the Board may have had thereunder. It recognizes that, with Section 9 (h) alone, many Communist-controlled unions could still obtain Board benefits; for, to preclude them, it is necessary first to establish that their officers have filed false affidavits, a matter often difficult of proof. To meet this problem, the 1954 Act broadens the circumstances under which a union may be deemed Communist-controlled, enabling the SACB to make such determination on the basis of a variety of factors indicative of Communist leadership and control. However, from this it does not follow that the new law was designed to preclude the Board from continuing to deny benefits in any cases where, as here, the rarer evidence that an officer falsified his affidavit exists. See R. 31, fn. 10.

IV

No Question is now Presented as to the Sufficiency of the Evidentiary Basis for the Board's Findings; in any Event, Those Findings are Amply Supported

Should this Court conclude, as we have urged, that the administrative investigation conducted by the Board was within its powers under the Act, the Union will doubtless contend (Union Memorandum on Certiorari, p. 2) that the decompliance action should nevertheless be set aside because the Board's findings are not supported by the evidence and procedural irregularities occurred in the course of the hearing. This further question was not considered or reached by either the District Court or the Court of Appeals, nor was it presented as a question in the Board's petition for certiorari. In these circumstances, it would appear that this question is not before this Court now and that its resolution would necessitate a remand to the court below. See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 37, n. 35.

However, should the Court consider the question ripe for its adjudication at this time, we submit that the facts summarized in the Statement (pp. 5-9, *supra*) demonstrate that there is ample support for the Board's findings and that the Union was accorded a full and fair hearing. The falsity of Travis' August 1949 affidavit is patent in the light, *inter alia*, of (1) his contemporaneous statement, which, on its face, manifests his continuing support of the policies of Communism and of the Communist Party, and (2) Travis' admission to former Union official Mason that "the Party people" at Communist Party headquarters in New York had cleared that statement, and that "it

meant that while Travis was resigning his membership in the Communist Party, it would not stop or change his work for it" (pp. 6-7, *supra*).

Similarly, the fact that Travis had not altered his allegiance to the Communist Party and that his succeeding affidavits were also false, is established by Mason's uncontradicted testimony that, as late as August 1953, Travis had told Mason, who had completely severed his Party ties, that he would be "way up" in the Union if he would "rejoin the Communist Party"; moreover, Travis proceeded to reject Mason's suggestion that recognition be given to the non-Communist faction in the Union, because "the Party and my people will not stand for those proposals" (p. 8, *supra*).

The falsity of Travis' affidavits alone, we submit, would have warranted the Board's determination that the Union was not in full compliance with Section 9(h), irrespective of whether the Union members were aware of the falsity (pp. 37-38, *supra*). The evidence, however, also supports the Board's further conclusion that there was membership awareness.[33] It shows that the statement in which Travis admitted the falsity of his initial affidavit was distributed to all the Union members in the Union's official newspaper. The Union membership was particularly qualified to evaluate Travis' 1949 newspaper article and his subsequent Communist activities, in view of "the CIO's investigation of Communist domination of the Union and its final expulsion

[33] The Board found it necessary to make this additional finding because, at the time of its determination, the *United Electrical* decision of the court below had left open the possibility of Board power only in a situation where the union members were aware of the officer's fraud (p. 11, n. 6, *supra*).

from the CIO in 1950; the revolt of scores of locals from the Union over the Communist issue; the Senate Sub-Committee (Judicial Committee) investigation in 1952 of Communist affiliation of Travis and other Union leaders, and Travis' refusal at the Sub-Committee hearing in Salt Lake City to testify regarding his non-Communist affidavits; and the resulting publicity to Union members" (pp. 8-9, *supra*).[34]

[34] The Board's denial of the motion of Travis and the Union to hold a further hearing on the issue of membership awareness was proper. The basis for the ruling on this motion, which the Board viewed as a renewal of earlier motions (rejected by the Hearing Officer) to recess the hearing to various cities for the purpose of calling large numbers of Union members to testify on awareness, was that: (1) "Respondents have not supported any of their motions by any indication that they definitely have witnesses available to testify on the issues, nor by disclosure of any evidence that otherwise might be afforded. Indeed, Respondents' counsel admitted, with reference to Respondents' motion to recess the hearing to various cities for testimony by Union members, that 'this is speculative because we haven't had an opportunity to consider it and discuss it with our people.' As of this date, Respondents have shown no further preparation" (R. 29-30).

(2) Moreover, the Union, although put on notice from the outset that membership awareness was an issue in the case, had offered no evidence whatever at the hearing to disprove such awareness. Contrary to the Union's contention, this failure could not be excused by the Hearing Officer's interim ruling of June 7, (R. 71-75), holding certain rebuttal evidence to be irrelevant, for this clearly applied only to the General Counsel's alternative theory of "Aesopian language," which formed no part of the Board's ulti-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded to the court below.

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AUGUST, 1956.

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 150), in addition to Section 9 (h) which is set forth at pp. 2-3, *supra*, are as follows:

REPRESENTATIVES AND ELECTIONS

Sec. 9 * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

B. Section 203.13(b) of the Rules and Regulations of the National Labor Relations Board, Series 5, and Section 202.3 of the Statements of Procedure, as amended August 18, 1948, 13 F.R. 4871, 4872, 29 C.F.R. §§ 102.13 (b), 101.3(b), provide:

RULES AND REGULATIONS

§ 203.13 *Compliance with section 9(f), (g) and (h) of the Act* * * *

(b) For the purpose of the regulations in this part, compliance with section 9 (h) of the Act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D.C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate

or constituent body has filed with the general counsel in Washington, D. C. and that the labor organization has filed with the regional director in the region in which the proceeding is pending.

(1) A declaration by an authorized representative of the labor organization executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

STATEMENTS OF PROCEDURE

§ 202.3 *Compliance with section 9 (f), (g) and (h) of the Act*—If a charge (or petition) is filed by a labor organization, that labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9(f)(b)(2) of the Act. At the time of filing the charge (or petition), or prior thereto or within a reasonable period of time

thereafter not to exceed 10 days, the labor organization must present the duplicate copy of a letter from the United States Department of Labor showing that it has filed the material required under section 9 (f) and (g) of the act and a declaration executed by an authorized agent stating the labor organization has complied with section 9(f)(b)(2) and setting forth the method by which compliance was made.

In addition, the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9 (h) of the act as follows: At the time of filing the charge (or petition) or prior thereto, or within a reasonable period not to exceed 10 days thereafter, the national or international labor organization shall have on file with the general counsel in Washington, D. C., and the local labor organization shall have on file with the regional director in the region in which the proceeding is pending, or in which it customarily files cases, a declaration by an authorized agent executed contemporaneously or within the preceding 12-month period listing the titles of all offices of the filing organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term, and an affidavit from each such officer, executed contemporaneously or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party and that he does not believe in, and is not a member of nor supports any organization that believes in or

teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

C. Section 102.13(b) of the Rules and Regulations of the National Labor Relations Board, Series 6, March 31, 1951, and Section 101.3 of the Statements of Procedure, 16 F.R. 1938, 11636, 14 F.R. 7250-7251, 29 C.F.R. §§ 102.13(b), 101.4 (1956 Supp.) provide:

RULES AND REGULATIONS

§ 102.13 * * *

(b) [The same as § 203.13, in "B" *supra,* with this added subparagraph]

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9(h) of the Act.

§ 101.3 [The same as § 202.3 in "B" *supra*, with this addition:]

In determining who is occupying an office and must, therefore, file an affidavit as an "officer", the Board will normally rely upon the designation of offices appearing in the constitution of the labor organization. Where, however, the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may require affidavits from additional persons.

Whenever all the requirements have been met, the Board in Washington, D. C., or the Regional Director, whichever is appropriate, issues to the labor organization appropriate notice of such compliance.